

It was undisputed claimant suffered a work-related injury to his lower back. But the parties were unable to agree on the nature and extent of his disability. The specific issue was whether claimant was entitled to a work disability or limited to his functional impairment because he had been terminated from his accommodated employment for violation of respondent's personnel policy. In addition, claimant argued that he was entitled to additional weeks of temporary total disability compensation.

The ALJ limited claimant's award to a 25 percent permanent partial functional impairment as claimant did not demonstrate a good faith effort to retain accommodated employment that paid 90 percent or more than his pre-injury average gross weekly wage.¹ And the ALJ concluded claimant was not entitled to more than the 19.67 weeks of temporary total disability compensation the parties stipulated claimant had been paid.

The claimant requests review of the following: (1) whether he is entitled to additional temporary total or temporary partial disability compensation for the period from March 23, 2006, through June 13, 2006; and, (2) nature and extent of disability, specifically whether claimant is entitled to a work disability.

Respondent argues claimant was terminated for cause and is not entitled to a work disability. Respondent further argues claimant is entitled to a 20 percent functional impairment based on Dr. John M. Ciccarelli's rating. In the alternative, respondent requests the ALJ's Award be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

On August 8, 2005, the claimant injured his back while carrying a table to a conference room. Claimant was diagnosed with a two-level disk herniation at L3-4 and L4-5. He was initially provided conservative medical treatment. When that course of treatment failed to improve his condition Dr. John M. Ciccarelli performed surgery on claimant's back on December 22, 2005. The surgery consisted of a decompression de-stenosis as well as a posterior spinal fusion spanning L3 through L5 levels with pedical-screw instrumentation in addition to bone grafting.

After the surgery claimant was provided temporary restrictions and respondent notified claimant that it had work available within those restrictions. Claimant returned to such work on March 22, 2006, for an hour and then left to go to an appointment with his personal physician for what he described at the time as rib and shoulder pain which the doctors had told him was not related to his back injury. Before he started work that day claimant had talked with a co-worker and when asked how his back was doing had responded that he "couldn't twist around enough to wipe his ass, so he probably better get rubber gloves for Shelly [claimant's supervisor] to use."² As the co-worker thought the

¹ See K.S.A. 44-510e(a).

² P.H. Trans. (May 22, 2006) at 59.

response was funny he related it to Shelly Michals, the claimant's supervisor. She found the comment disrespectful and prepared a letter terminating claimant's employment.

The claimant later called respondent the same day and stated he had been referred to the Olathe Medical Center for x-rays. On March 23, 2006, claimant neither called in nor showed up for work. On March 24, 2006, claimant called and left a message on his supervisor's cell phone that he had not been released from the hospital until the evening of March 23, 2006 and because he was not feeling well he would not be in to work. When claimant called back later that day he was told he had been terminated March 23, 2006, for violating respondent's no call/no show policy as well as disrespectful conduct.

The primary issue is whether claimant's termination for violation of respondent's personnel policies prevents him from receiving a work disability. The Board notes that the test of whether a termination disqualifies an injured worker from entitlement to a work disability remains one of good faith, on the part of both claimant and respondent.³

A literal reading of K.S.A. 44-510e would indicate claimant is entitled to receive a permanent partial general disability based upon his wage loss and his task loss. That statute provides, in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But the appellate courts have not always followed the literal language of the statute. Instead, the courts have, on occasion, added additional benchmarks for injured workers to satisfy before they become entitled to receive permanent disability benefits in excess of the functional impairment rating. For example, *Foulk*⁴ and *Copeland*⁵ held that workers

³ See *Helmstetter v. Midwest Grain Products, Inc.*, 29 Kan. App. 2d 278, 28 P.3d 398 (2001) and *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, rev. denied 267 Kan. 889 (1999).

⁴ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

⁵ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

must make a good faith effort to work or to find appropriate employment after their injuries before they are entitled to receive a work disability under K.S.A. 44-510e. And if the injured worker fails to prove good faith to find appropriate work, a post-injury wage must be imputed.

If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.⁶

Assuredly, the concepts of good faith effort and imputing wages are neither mentioned in K.S.A. 44-510e or any other statute in the Act.

In *Ramirez*⁷, the Kansas Court of Appeals again departed from the literal language of K.S.A. 44-510e and held a worker who had injured his upper extremities was not entitled to a work disability because the worker had failed to disclose an earlier back injury in a pre-employment application. But the Act contains no provision that an incomplete or erroneous pre-employment application precludes an award of work disability. Indeed, the injured worker in *Ramirez* probably felt the court's holding was especially punitive as the injury that was not disclosed in the pre-employment application was not related in any manner to the injury he later sustained.

And in *Mahan*⁸, the Kansas Court of Appeals held that when an employee has failed to make a good faith effort to retain his or her current employment, *any* showing of the potential for accommodated work at the same or similar wage rate precludes an award for work disability.

We hold that where the employee has failed to make a good faith effort to retain his or her current employment, a showing of the *potential* for accommodation at the same or similar wage rate precludes an award for work disability. It would be unfair under circumstances where the employee has refused to make himself or herself eligible for reemployment to require the employer to show that the employee was specifically *offered* accommodated employment at the same or similar wage rate.⁹

⁶ *Id.* at 320.

⁷ *Ramirez v. Excel Corp.*, 26 Kan. App. 2d 139, 979 P.2d 1261, *rev. denied* 267 Kan. 889 (1999).

⁸ *Mahan v. Clarkson Constr. Co.*, 36 Kan. App. 2d 317, 138 P.3d 790, *rev. denied* 282 Kan. ____ (2006).

⁹ *Id.* at 321.

Again, the Act contains no such provision that failing to make a good faith effort to retain employment is a valid defense to a claim for disability benefits. Indeed, in *Oliver*¹⁰ the Kansas Court of Appeals held that neither K.S.A. 1998 Supp. 44-510e(a) nor Kansas case law required an injured worker to always seek post-injury accommodated work from his or her employer before seeking work elsewhere. And in *Rash*¹¹, the Kansas Court of Appeals held the offering or accepting of accommodated employment was simply another factor in determining whether the employee had engaged in a good faith effort to seek appropriate employment.

Heartland would have us punish employees with a harsher result for not accepting accommodated employment. This argument is contrary to *Oliver*. The lesson from *Oliver* is that an employer is not required to offer accommodated employment. Equally, an employee is not required to accept an offer of accommodated employment from his or her employer. ***The offering or accepting of accommodated employment is simply another factor in determining whether the employee has engaged in a good faith effort to seek appropriate employment.*** An employee who rejects an offer of accommodated employment has a good faith duty to seek appropriate employment within his or her restrictions. If the employee fails in this effort, “the factfinder [*sic*] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.” *Copeland*, 24 Kan. App. 2d at 320.¹² (Emphasis added)

The Kansas Supreme Court, however, has recently sent two strong signals that the Act should be applied as written. In *Graham*¹³, the Kansas Supreme Court rejected an interpretation of the wage loss prong in the work disability formula that did not comport with the literal reading of K.S.A. 44-510e. The Kansas Supreme Court wrote, in part:

When a statute is plain and unambiguous, a court must give effect to its express language, rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statute’s language is clear, there is no need to resort to statutory construction.¹⁴

¹⁰ *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, rev. denied 267 Kan. 889 (1999).

¹¹ *Rash v. Heartland Cement Co.*, 37 Kan. App. 2d 175, 154 P.3d 15 (2006).

¹² *Id.* at 185.

¹³ *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007).

¹⁴ *Id.* at Syl. ¶ 3.

Moreover, in *Casco*¹⁵, the Kansas Supreme Court overturned 75 years of precedent on the basis that earlier decisions did not follow the literal language of the Act. The Court wrote:

When construing statutes, we are required to give effect to the legislative intent if that intent can be ascertained. When a statute is plain and unambiguous, we must give effect to the legislature's intention as expressed, rather than determine what the law should or should not be. A statute should not be read to add that which is not contained in the language of the statute or to read out what, as a matter of ordinary language, is included in the statute.¹⁶

Despite the Kansas Supreme Court's clear signals to follow the literal language of the Act, it is not for this Board to substitute its judgment for that of the appellate courts. Consequently, the Board is compelled to follow the law set forth in *Ramirez*¹⁷.

Claimant was aware of respondent's policies with regard to no call/no show and disrespectful conduct as he had been disciplined regarding those policies before the final incidents on March 22 and 23, 2006. The record reveals that claimant had been disciplined on several occasions before his accident, while he was performing accommodated work before his surgery and then terminated for the final incidents. This history undermines the claimant's argument that respondent was simply looking for an excuse to get rid of him after his injury.

Specifically, claimant received a disciplinary letter on June 22, 2005, for failure to call in when he was not going to show up for work. And on August 19, 2005, claimant received a disciplinary letter for insubordination and disrespectful behavior when he raised his voice and was rude to his supervisor in front of a tenant. It was noted that repeat violation was just cause for termination from employment. And while receiving treatment for his injury claimant was repeatedly admonished to provide off work slips but there would be long periods of time when claimant neither called in to work nor provided the requested off work slips. And then he would finally provide the slips when threatened with termination.

In summary, claimant had received disciplinary warnings for various violations before and after his accident including failure to request time off; failure to call in when late; insubordination for yelling at his supervisor; working overtime without prior approval; and repeated no call/no shows. His failure to call in when he was kept in the hospital occurred after he had been disciplined for failure to call in. Most telling was claimant's admission

¹⁵ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007).

¹⁶ *Id.* at Syl. ¶ 6.

¹⁷ *Ramirez v. Excel Corp.*, 26 Kan. App. 2d 139.

the violations occurred and the failure to explain his behavior other than the comment he was thinking about other things when he failed to call in.

The claimant's off-color comment regarding his supervisor was made in confidence to a co-worker and was intended as a joke that would not be relayed to the supervisor. The Board finds that comment alone would not support a finding that claimant failed to make a good faith effort to retain his employment. However, it is claimant's failure to report that he would not be in to work that is the most difficult to accept given the warnings he had received. And he offers no convincing reason why he did not provide respondent notice that he would not be in to work on March 23, 2006.

The Board agrees with and adopts the ALJ's determination that claimant did not demonstrate good faith whereas respondent exhibited good faith in its repeated efforts to discipline claimant and in its ultimate conclusion to terminate claimant's employment. The Board concludes claimant is not entitled to a work disability because he was terminated for misconduct as held in *Ramirez*.¹⁸ Accordingly, claimant's conduct is tantamount to refusing to work as in *Foulk*.¹⁹ and, therefore, the salary that he was receiving from respondent should be imputed for the post-injury wage in the wage loss prong of the permanent partial general disability formula. Ms. Michals testified that but for his termination claimant would have been returned to his job as a maintenance aide with accommodation for his restrictions.²⁰ As this would have returned claimant to his pre-injury wage, claimant is limited to compensation calculated by using his percentage of functional impairment.

Based upon the *AMA Guides*²¹, Dr. Ciccarelli opined claimant suffered a 20 percent whole person functional impairment. Based upon the *AMA Guides*, Dr. Michael J. Poppa opined claimant had a 25 percent whole person functional impairment. As both opinions are equally persuasive the Board finds claimant has met his burden of proof to establish that he suffered a 22.5 percent functional impairment. The ALJ's Award is modified accordingly.

The Board further finds that claimant failed to meet his burden of proof to establish that he was entitled to either additional temporary partial or temporary total disability compensation. It should be noted that claimant's temporary total disability compensation rate was incorrectly calculated in the ALJ's Award. The claimant was still receiving his

¹⁸ *Ramirez v. Excel Corp.*, 26 Kan. App.2d 139.

¹⁹ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

²⁰ See *Mahan v. Clarkson Constr. Co.*, 36 Kan. App. 2d 317.

²¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

fringe benefits while temporary total disability compensation was paid. As a consequence, based upon a \$490.03 base wage, before inclusion of the value of fringe benefits, claimant's temporary total disability compensation rate calculates to \$326.70.

Although claimant's attorney attached his written contract with claimant to his brief to the Board, K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Consequently, claimant's counsel must file and submit his written contract with claimant to the ALJ for approval.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated September 26, 2007, is modified to reflect claimant suffered a 22.5 percent whole person functional impairment.

The claimant is entitled to 19.67 weeks of temporary total disability compensation at the rate of \$326.70 per week or \$6,426.19 followed by 92.32 weeks of permanent partial disability compensation at the rate of \$326.70 per week or \$30,160.94 for a 22.50 percent functional disability, making a total award of \$36,587.13, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of February 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael J. Haight, Attorney for Claimant
Shelly E. Naughtin, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge